Ruhimin Adzim @ Ruhimin bin Ajim v Tan Sri Bernard Dompok & Ors

HIGH COURT (KOTA K1NABALU) — ELECTION PETITION NO K26–01 OF 2004
CLEMENT SKINNER J
16 JULY 2004

Constitutional Law — Courts — Election petition — Whether election judge can exercise powers conferred by Rules of The High Court — Whether preliminary objection against election petition can be made instead of making an application to strike off

Constitutional Law — Courts — Election petition — Whether petitioner must set out under which limb the petition is brought — Election Offences Act 1954 s 34 — Whether writing left by petitioner with the registrar must be left stamped, signed and together with petition — Whether two copies of petition left with registrar — Election Petition Rules 1954 rr3(2), 9

Constitutional Law — Courts — Election petition — Petitioner failed to state material facts and grounds — There are some vague allegations — Whether whole petition or only relevant paragraphs ought to be struck off

Constitutional Law — Courts — Election petition — Service — Whether must be served within 15 days — Affidavit of service — Whether sufficient if filed with all convenient speed

Constitutional law — Courts — Election petition — Whether petitioner must state how non-compliance of written law relating to conduct of election affected election result — Election Offences Act 1954 s32(b)

Statutory Interpretation — Construction of statutes — Interpretation Act — Computation of time — Whether non-working Saturday an excluded day — Interpretation Act 1948 and 1967 s 3

In the recently concluded general election for the parliamentary constituency of Ranau (P179), the first respondent was returned as the duly elected candidate. He defeated three other candidates, one of whom was the petitioner who seeks to have the first respondent's election declared void for several violations allegedly committed by him against the provision of the Election Offences Act 1954 ('the Act') and the Election Petition Rules ('the Rules'). The petitioner also alleged certain improprieties against the second defendant in the conduct of the election. On being served the petition, the first respondent filed a motion to have it set aside on various grounds. The second respondent also gave notice that on the hearing of this petition several preliminary objections would be raised. Some of the objections raised by the first respondent are also raised by the second respondent. Amongst the objections or issues raised by the respondents are inter alia that the petitioner (1) failed to comply with the Rules and s 34 of the Act by failing to set out his right to present the election

petition; (2) failed to comply with r 9 of the Rules by not leaving at the office of the registrar writing stamped with duty payable; (3) failed to state material facts and grounds relied on to sustain the prayers; (4) failed to state how the non-compliance of the provisions of the written law relating to the conduct of the election has affected the result of the same; (5) contravened s 9A of the Act by questioning the electoral rolls; (6) left at the office of the registrar writing without two copies of the petition, not signed by the petitioner himself and not duly stamped; (7) failed to file affidavit of service until search done by first respondent's advocate; and (8) failed to serve the petition to the first respondent within 15 days of the presentation of the same as required by r 15(1) of the Rules. The petitioner in turn stated that (1) the judge can exercise the original jurisdiction vested in the court by the Rules of the High Court to forgive and cure defects; and (2) the second respondent should have filed application under O 18 r 19 of the Rules of the High Court to raise the objection now taken instead of raising them as preliminary objection. This was the hearing of the motion and preliminary objections.

Held, dismissing the petition with costs:

(1) A judge hearing matters connected to an election petition can have recourse to the Rules of the High Court 1980 only in matters not expressly provided for in the Election Petition Rules (see para 5).

(2) Objections to an election petition are issues of law which should be disposed of as preliminary objections for which no notice is required (see para 6).

(3) Once it can be ascertained that the right petitioner claims come within s 34 of the Act, the petitioner can be said to have complied with the Rules. So long as the petitioner can show that was right, it matters not whether it falls within the first, second or third limb of s 34 of the Act because the latter adds nothing to the right that is asserted (see para 10).

(4) It has not been demonstrated by the second respondent that the writing referred to in r 9 of the Rules is chargeable with any stamp duty and therefore there was no merit in the objection and it was rejected (see para 16).

(5) With regard to the allegation that the first respondent manipulated the results of the election, no material facts have been pleaded upon which such an allegation may be raised. It is clearly a bare allegation which does not disclose any cause of action and so the first part of para 6 which refers to the first respondent ought to be struck out. It follows that there is no reason to strike out the whole petition for the deficiency in pleadings of the petitioner (see para 33).

(6) No where in r 4(1)(b) of the Rules stated that the petitioner must state how the non-compliance has affected the result of the election. In the

second place, nothing in s 32(b) of the Act even suggests that the petitioner must state how the non-compliance with the provisions of any written law relating to the conduct of the election affected the result of the same (see para 36).

(7) The petitioner is clearly questioning the contents and validity of the electoral rolls when he alleges that voters could not vote because their names could not be found on the electoral rolls or were unlawfully removed from the electoral rolls. However this transgression in pleading by the petitioner would not result in the whole petition being struck out. Only the offending allegation in the second part of para 7 ought to be struck out (see para 40).

(8) The 'writing' which the second respondent complained about is actually the notice filed at the registry by the advocate for the petitioner, giving notice that he has been appointed to act. The notice is filed pursuant to r 34 of the Rules. There is nothing stated in this rule that requires the notice to be to be signed by the petitioner himself, dully stamped and left together with the petition as alleged by the second respondent (see para 43).

(9) The petitioner's return of the two copies of the petition to the registry for posting up on the notice board by way of service, did not afford substantial compliance with r 3(2) of the Rules which is couched in peremptory language with the use of the word 'shall'. The consequence of the non-compliance renders the petition defective by reason whereof it must be dismissed (see para 56).

(10) Rule 15(4) of the Rules does not stipulate any time frame within which an affidavit of service must be filed. Section 54(2) of the Interpretation Act 1948 and 1967 states that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed (see para 74).

(11) 15 May 2004 was a third Saturday which is a non working day for the government and its agencies, but it is not an excluded day. The consequence of the petitioner's failure to serve the petition in accordance with the mandatory provisions of r 15(1) of the Rules renders the petition a nullity which the court in the exercise of its inherent powers has dismissed (see para 95).

[**Bahasa Malaysia summary**

Pada pilihan raya umum yang baru selesai di konstituen Ranau (P179), responden pertama kembali sebagai calon yang dipilih. Dia telah mengalahkan 3 orang calon yang lain, salah seorang dari mereka adalah pempetisyen yang mengehendaki pemilihan responden kedua dibatalkan kerana beberapa

pelanggaran Akta Kesalahan Pilihan raya 1954 ('Akta tersebut') dan Kaedah-Kaedah Petisyen Pilihan Raya (Kaedah-Kaedah tersebut). Pempetisyen juga mendakwa terdapat beberapa ketidakaturan oleh defendan kedua dalam menjalankan pilihan raya. Selepas petisyen diserahkan, responden pertama telah memfailkan notis usul untuk mengenepikannya berdasarkan kepada beberapa sebab. Responden kedua juga memberi notis yang semasa bicara petisyen beberapa bantahan awal akan dikemukakan. Di antara bantahan atau isu-isu yang dibangkitkan adalah inter alia pempetisyen: (1) gagal mengikut Kaedah-Kaedah tersebut dan s 34 Akta tersebut kerana gagal menyatakan haknya untuk mengemukakan petisyen pilihan raya; (2) gagal mengikut kaedah 9 dengan tidak meninggalkan dengan pendaftar tulisan yang di setem dengan duti sudah dibayar; (3) gagal mengemukakan fakta yang material dan alasan yang disandari untuk menyokong tuntutannya; (4) gagal menyatakan bagaimana dengan tidak mengikut undang-undang bertulis mengenai pengendalian pilihan raya telah mengacau keputusannya; (5) bertindak bertentangan dengan s 9A Akta tersebut dengan menyoal senarai pilihan raya; (6) meninggalkan di pejabat pendaftar tulisan tanpa 2 salinan petisyen, tidak ditandatangani oleh pempetisyen dan tidak distem; (7) gagal memfailkan afidavit penyampaian sehingga carian dibuat oleh peguam responden pertama; dan (8) gagal menyerahkan petisyen kepada responden pertama dalam tempoh masa 15 hari seperti yang diperlukan oleh kaedah 15(1). Pempetisyen pula mengatakan: (1) hakim boleh menggunakan bidang kuasa asal yang diberi oleh Kaedah-Kaedah Mahkamah Tinggi untuk memaafkan dan membetulkan kesilapan; dan (2) responden kedua sepatutnya membuat permohonan di bawah aturan 18 kaedah 19 Kaedah-Kaedah Mahkamah Tinggi untuk membangkitkan bantahan yang dikemukakan di sini dan tidak sepatutnya bangkitkannya sebagai bantahan awal. Ini adalah perbicaraan notis usul dan bantahan awal.]

Diputuskan, membatalkan petisyen dengan kos:

(1) Hakim mendengar perkara berkaitan dengan petisyen pilihan raya boleh bersandar pada Kaedah-Kaedah Mahkamah Tinggi 1980 hanya untuk perkara yang tidak diperuntukkan di dalam Kaedah-Kaedah Petisyen Pilihan raya (lihat perenggan 5).

(2) Bantahan kepada petisyen pilihan raya adalah isu undang-undang yang harus diputuskan sebagai bantahan awal untuk yang mana tiada notis diperlukan (lihat perenggan 6).

(3) Setelah boleh dipastikan hak yang pempetisyen tuntut adalah di bawah s 34 Akta tersebut, pempetisyen telah mengikut Kaedah-Kaedah tersebut. Sehingga pempetisyen dapat menunjukkan hak tersebut, dia tidak perlu menunjukkan sama ada dia jatuh di bahagian pertama, kedua atau ketiga s 34 Akta tersebut kerana ia tidak menambahkan apa-apa hak (lihat perenggan 10).

(4) Responden kedua tidak menunjukkan bahawa tulisan yang dirujuk di dalam kaedah 9 Kaedah-Kaedah tersebut boleh dikenakan duti setem dan oleh demikian tiada merit dalam bantahannya dan ia ditolak (lihat perenggan 16).

(5) Berkenaan dengan tuduhan responden pertama manipulasikan keputusan pilihan raya, tiada fakta material yang dinyatakan untuk membangkitkan tuduhan sebegitu. Ia adalah tuduhan semata-mata yang tidak membangkitkan sebarang kuasa tindakan, maka bahagian pertama perenggan 6 yang rujuk kepada responden pertama harus dibatalkan. Tiada sebab untuk membatalkan seluruh petisyen untuk kekurangan dalam pliding pempetisyen (lihat perenggan 33).

(6) Tiada di mana-mana dalam kaedah 4(1)(b) Kaedah-Kaedah tersebut yang menyatakan pempetisyen harus menyatakan bagaimana ketidakpatuhannya telah mengacau keputusan pilihan raya (lihat perenggan 36).

(7) Pempetisyen jelas sedang menyoal kandungan serta 'kesahan' senarai pilihan raya apabila dia mengatakan yang pengundi tidak boleh mengundi kerana nama mereka tidak terdapat dalam senarai pilihan raya atau dikeluarkan secara tidak adil. Walau bagaimanapun, ia tidak akan mengakibatkan keseluruhan petisyen dibatalkan tetapi hanya tuduhan tersebut di bahagian kedua di dalam perenggan 7 harus dibatalkan (lihat perenggan 40).

(8) 'Tulisan' yang responden kedua mengadu tentang sebenarnya ialah notis yang difailkan di pendaftaran oleh peguam pempetisyen, yang memberi notis bahawa dia dilantik untuk bertindak. Notis ini difailkan berdasarkan kepada kaedah 34 Kaedah-Kaedah tersebut. Tiada apa-apa yang dinyatakan dalam Kaedah-Kaedah tersebut yang kehendaki notis tersebut ditandatangani oleh pempetisyen, distem dan ditinggalkan dengan petisyen seperti yang dinyatakan oleh responden kedua (lihat perenggan 43).

(9) Pemulangan pempetisyen dua salinan petisyen kepada pendaftaran untuk dikelipkan ke atas papan notis sebagai penyerahan, bukanlah patuhnya kaedah 3(2) Kaedah-Kaedah tersebut yang ditulis dengan perkataan 'harus'. Maka ketidakpatuhan ini menjadikan petisyen tersebut cacat dan ia harus dibatalkan (lihat perenggan 56).

(10) Kaedah 15(4) tidak menyatakan sebarang tempoh di mana afidavit penyampaian mesti difailkan. Seksyen 54(2) Akta Penterjemahan 1948 dan 1967 menyatakan sekiranya tiada tempoh masa yang ditetapkan, ia harus dilakukan dalam kelajuan yang selesa (lihat perenggan 74).

(11) 15 Mei 2004 ialah hari Sabtu ketiga yang merupakan hari cuti kerajaan dan agensi-agensinya, tetapi bukan hari yang tidak diambilkira. Kegagalan pempetisyen untuk menyerahkan petisyen mengikut peruntukan mandatori

kaedah 15(1) kaedah-kaedah tersebut menjadikan petisyen tersebut terbatal dan mahkamah membatalkannya (lihat perenggan 95).]

Notes

For cases on service of election petition, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1558–1559

For cases on election petition, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1909–1911

For cases on statutory interpretation, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1909–1911

Cases referred to

Dr Lee Chong Meng v Abdul Rahman bin Hj Abdullah, Returning Officer & Ors (No 2) [2000] 3 MLJ 218 (folld)
Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali [1999] 5 MLJ 629 (refd)
Howard v Bodington (1877) 10 2PD 203 (refd)
Isahak Hamid v Mustapha [1965] 2 MLJ 18 (refd)
Norbert Chong Kai Chong v Mohamed Idris bin Hj Ibrahim & Anor [1980] 1 MLJ 316 (folld)
Patau Rubis v Patrick Uren & Anor [1984] 2 CLJ (Rep) 345 (refd)
Ramely bin Mansor v Suruhanjaya Pilihanraya Malaysia & Ors [2000] of MLJ 550 (refd)
Re Dato' Loh Fook Yen Ex Parte Malaysian United Finance Bhd [1988] 3 MLJ 499 (refd)
Tengku Korish v Mohamed bin Jusoh & Anor [1970] 1 MLJ 6 (refd)

Legislation referred to

Elections Act 1958
Election Offences Act 1954, ss 32(b), 34
Election Petition Rules 1954, rr 3(2), 4(1)(b), 9, 15(1), (4), 34
Interpretation Acts 1948 and 1967, ss 3, 54(2)
Stamp Act 1949, ss 52, 53

Liew Hon Min (Liew Hon Min) for the petitioner.
Douglas Primus (Lee & Thong) for the first respondent.
Pretam Singh a/l Darshan Singh and Narkunavathy Sundareson (Senior Federal Counsel, Attorney-General's Chambers) for the second respondent.

Clement Skinner J:

[1] In the recently concluded general election for the parliamentary constituency of Ranau (P179) which was held on 21 March 2004, the first respondent, Tan Sri Bernard Dompok was returned as the duly elected candidate with a winning majority of 1,307 votes. He defeated three other candidates, one of whom was the petitioner Ruhimin Adzim @ Ruhimin

Ajun, who seeks to have the second respondent's election declared void for several violations allegedly committed by him against the provision of the Election Offences Act 1954 ('the Act'). The petitioner also named the returning officer as the second respondent in this petition, alleging certain improprieties against him in the conduct of the election.

[2] On being served the petition, the first respondent filed a motion to have it set aside on various grounds which I will address shortly. The second respondent also gave notice that on the hearing of this petition several preliminary objections would be raised. This is the hearing of the motion and preliminary objections.

[3] Some of the objections raised by the first respondent are also raised by the second respondent and so for convenience I will begin by addressing the seven objections taken by the second respondent, although not in the order they have raised. Counsel for the first respondent said he was associating himself with and adopting all the objections raised by the second respondent as the first respondent's own.

[4] Before I address the objection I wish to deal with two points raised by the petitioner. It was first said that in hearing this interlocutory application, although I exercise jurisdiction as an election judge, I have not abdicated my powers as a High Court judge and can exercise original jurisdiction including that vested in the court by the Rules of the High Court, so that I should be prepared to exercise the powers to forgive and cure defects in the proceedings before me as allowed by the Rules of the High Court.

[5] To this I would say that while s 33(4) of the Act allows for any judge of the High Court to hear all interlocutory matters in connection with an election petition, unless otherwise ordered by the Chief Judge, the jurisdiction and the powers that such a judge administers must be exercised in accordance with the law that confers that jurisdiction, namely, the Election Offences Act 1954, and with the amendment to s 42(2) of the Act, a judge hearing matters connected to an election petition can have recourse to the Rules of the High Court 1980 only in matters not expressly provided for in the Election Petition Rules. I do not think, therefore, that a High Court judge hearing interlocutory matters connected to an election petition has been given *carte blanche* to exercise powers under the Rules of the High Court 1980.

[6] It was next said that the second respondent should have filed an application under O 18 r 19 Rules of the High Court 1980 to raise the objections now taken instead of raising them as preliminary objections. The short answer to this objection is that objections to an election petition are issues of law which should be disposed of as preliminary objections for which no notice is required. This was decided in *Norbert Chong Kai Chong v Mohamed Idris bin Hj Ibrahim & Anor* [1980] 1 MLJ 316 by Harun J. It is a decision with which I respectfully agree. With that I turn to the objections raised.

[7] The first objection was that the petitioner failed to comply with r 4(1)(a) of the Election Petition Rules 1954 ('the Rules') by failing to set out his right to present this election petition within s 34 of the Act. Section 34 identifies three categories of persons who may present an election petition. They are:

(a) some person who has voted or had a right to vote at the election to which the petition relates;

(b) some person claiming to have had a right to be returned or elected at such election; or

(c) some person alleging himself to have been a candidate at such election.

[8] A reading of r 4(1)(a) of the Rules shows that it requires an election petition to state the right of the petitioner to petition within s 34 of the Act. Did the petitioner comply with r 4(1)(a) of the Rules? A perusal of the petition shows that in para 1 thereof, the petitioner has stated that he was a candidate at and had also voted at the election for the parliamentary constituency of P179 Ranau. But the second respondent complains that the petitioner did not comply with r 4(1)(a) because he did not state 'under which limb' of s 34 'he intends to bring this petition'.

[9] I regret that I find no merit in this objection and have no hesitation in rejecting it. In my view what is stated in para 1 by the petitioner adequately states his right to present this petition, and anyone reading para 1 can see that the petitioner claims that right by virtue of his having been a candidate as well as having voted at the election held for the Ranau constituency.

[10] All r 4(1)(a) requires is that the petitioner states his right to petition. Once the petitioner has done so and it can be ascertained that the right he claims comes within s 34 of the Act, the petitioner can be said to have complied with the rule. So long as the petitioner can show that right, it matters not whether it falls within the first, second or third limb of s 34 of the Act because the latter adds nothing to the right that is asserted. So, whether the petitioner mentions or omits to mention under which limb of s 34 he claims to have the right brought the petition is totally irrelevant to the right asserted and cannot affect the right in any way. What I have just said will apply with equal force to the second respondent's complaint that the petitioner did not expressly state in the petition that the right under which he presented this petition comes 'within s 34' of the Act. The fact that the petitioner did not do so does not detract in any way from the fact that the right claimed does come within s 34 of the Act.

[11] The second objection taken related to the petitioner's alleged non-compliance of r 9 of the Rules, which requires that when the petitioner presents his petition to the registrar he must also leave a writing signed by him, giving the name of an advocate whom he authorizes to act as his advocate or stating that he acts for himself as the case may be and giving an address in Malaysia

at which notices may be left. Rule 9 goes on to state that 'every such writing shall be stamped with the duty payable thereon under the law for the time being in force'. It is the second respondent's complaint that the writing left at the office of the registrar by the petitioner was not stamped with the duty payable thereon. According to learned Senior Federal Counsel, the writing not being stamped, it could not be acted on (see *Isahak Hamid v Mustapha* [1965] 2 MLJ 18 at p 20); and it was also inadmissible and could not be adduced in evidence (see *Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali* [1999] 5 MLJ 629 at p 634 and 635).

[12] Since this rule requires that the writing be stamped 'with the duty payable thereon', under the law for the time being in force, I enquired from learned Senior Federal Counsel what the stamp duty payable for the writing was, and under which law such duty was imposed and payable. Learned Senior Federal Counsel said that under s 4 of the Stamp Act 1949, the several instruments specified in the First Schedule to the Stamp Act were chargeable with the duties specified in such Schedule, and he said that the writing was covered by Item 37 or 38 of the schedule for which RM10 stamp duty was chargeable.

[13] Item 37 reads:

DECLARATION of any use or trust of or concerning any property by any writing, not being a Will, or an instrument chargeable with duty as a settlement.	RM10.00

[14] Item 38 reads:

DEED of any kind not described in this Schedule	RM10.00

[15] With all due respect, I just do not see how the writing in this case, which is a notification about whether the petitioner has authorised an advocate to act for him or he acts in person for himself, and giving an address in Malaysia at which notices may be left, is covered by Item 37 which refers to any writing or settlement, not being a Will, which is a declaration of any use or trust of or concerning any property. Neither does the writing in this case fall within the definition of a Deed which is a document under seal for which no consideration is required.

[16] In my judgment as it has not been demonstrated by the second respondent that the writing referred to in r 9 is chargeable with any stamp duty, I find no merit in the second objection and reject it. So the question whether it can be acted on or is admissible in evidence does not arise at all.

[17] Even if the writing was chargeable with stamp duty, I would still not strike out the petition on this ground because the non-compliance is one that goes to admissibility only of the document in question and what the court would do in such a case is to impound the writing and only admit it in evidence when the stamp duty and penalty, if any, is paid by the petitioner as provided in s 52 and 53 of the Stamp Duty Act 1949.

[18] I will deal with the third objection in the later part of this judgment.

[19] The fourth ground of objection was that the petitioner failed to comply with r 4(1)(b) of the Rules read together with s 32(b) of the Act, in that, the petitioner had failed to state material facts and grounds relied on to sustain the prayers in the petition.

[20] Rule 4(1)(b) states that:

> An election petition shall contain the following statements:
>
> (a) ….
>
> (b) it shall state the holding and results of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

[21] Learned Senior Federal Counsel referred me to the case of *Patau Rubis v Patrick Uren & Anor* [1984] 2 CLJ (Rep) 345 at p 353 and 354 where Charles NC Ho J, said this about pleading material facts in an election petition:

> … material facts sufficient to establish a cause of action must be stated. It is of vital importance that the petition must disclose a cause of action. Para 3(a) as it stands contains only vague allegations without facts relied on to support them. It does not disclose any cause of action and therefore ought to be struck out.

[22] I respectfully agree with what was stated there by his Lordship. The question is, is the petitioner guilty of making vague allegations without facts relied on to support them, or, has he failed to plead material facts sufficient to establish a cause of action?

[23] As far as the second respondent is concerned, allegations are made against him only in paras 6, 7 and 8 of the petition. It is best that each paragraph be looked at in turn.

[24] The second part of para 6 of the petition contains an allegation that the second respondent or his agents allowed many electors of the constituency to bring ballot papers out of the polling stations as a result of which some ballot papers went missing or were unaccounted for and by way of particulars of what was alleged, the petitioner stated that 'from the form 16 supplied to him which the second respondent signed, 298 of the total ballot papers issued for the constituency were missing or unaccounted for; that one ballot paper went missing at polling station P179/29/05 Pinawantai; that another ballot paper went missing at polling station P179/29/06 Timbua; that not less than 15 postal ballot papers went missing'.

[25] The second respondent complains that while it is alleged that 298 ballot papers were unaccounted for, the allegation is too vague as the petitioner failed to identify the polling stations at which those ballot papers remained unaccounted for. I regret I do not agree with the second respondent's complaint. The figure of 298 ballot papers allegedly unaccounted for is given by way of particulars only of the material facts pleaded to establish the petitioner's cause of action, namely, that ballot papers were taken out of the polling stations, which allegation when read with para 9.5 and 9.6 of the petition, is an allegation of non-compliance with the provisions of written law relating to elections, namely, s 5 of the Act read with r 19(5) of the Election (Conduct of Election) Regulations 1981 and which non-compliance affected the result of the election. I cannot see anything wrong with para 6 of the petition as far as it concerns the second respondent. If the second respondent is unhappy with the particulars or the lack of it, he can always apply to be supplied the same, but that does not make para 6 defective.

[26] Para 7 of the petition alleges that the second respondent and/or his agents allowed impersonation as others had voted in the name of electors. The second respondent complains that the allegation lacks the 'essential ingredients' such as the identities of the election workers who allowed the transgression and the identities of the voters who were prevented from voting.

[27] I regret to see no merit in this complaint. What the second respondent really wants is particulars relating to the allegations made, such as the names of the persons alleged involved and affected by the impersonation. If so, the second respondent should apply for particulars of the allegation, but that does not make para 7 defective as alleged.

[28] Para 8 of the petition alleges that the results of the election was rigged and/or manipulated by the second respondent and/or his agents by altering the records of the results. The second respondent complains that the petitioner has not pleaded any material facts to support the allegations made. In the course of submissions Mr Liew of counsel for the petitioner conceded, quite properly in my view, that the allegations in para 8 were bare allegations made without any material facts pleaded in support of it. I think that is the inevitable conclusion when para 8 is read. There are insufficient material facts pleaded to disclose any cause of action and therefore para 8 ought to be struck out.

[29] With regard to the first respondent, only paras 4, 5 and 6 of the petition concern him.

[30] Para 4 alleges that the first respondent and/or his agents had with his knowledge committed general cheating by providing voters with food and drinks at BN Markas within the constituency during the campaign period for the election.

[31] Para 5 alleges that the first respondent and/or his agents committed bribery and corrupt practices by distributing water tanks and money to voters before and during polling day.

[32] The first part of para 6 alleges that the first respondent or his agents with his knowledge manipulated the results of the election.

[33] The first respondent complains that these allegations which are of a quasi–criminal nature and which attract penal consequences, are too vague and general, except for the allegation in the first part of para 6, I find no merit in the first respondent's complaint. In my view the petitioner has pleaded sufficient material facts in paras 4 and 5 to establish a cause of action for general cheating as well as bribery and corrupt practices. If it is the particulars regarding the names, dates, places and the like information which the first respondent requires then he should apply for particulars, but as I mentioned earlier this does not make the paras 4 and 5 defective as alleged. With regard to the allegation in the first part of para 6 that the first respondent manipulated the results of the election, I agree with counsel for the first respondent that no material facts have been pleaded upon which such an allegation may be raised. It is clearly a bare allegation which does not disclose any cause of action and so the first part of para 6 which refers to the first respondent ought to be struck out.

[34] It follows from what I have said that there is no reason to strike out the whole petition for the deficiency in pleadings of the petitioner. For reasons explained shortly, only those offending paragraphs I have identified need to be struck out.

[35] The fifth objection is that the petitioner failed to comply with r 4(1)(b) of the Rules read together with s 32(b) of the Act, in that, the petitioner failed to state how the non-compliance of the provisions of the written law relating to the conduct of the election has affected the result of the same.

[36] I regret to say that I find no merit in this objection and have no hesitation rejecting it. In the first place no where in rule 4(1)(b) is it stated that the petitioner must state how the non-compliance has affected the result of the election. In the second place, I can see nothing in s 32(b) of the Act which even suggests that the petitioner must state how the non-compliance with the provisions of any written law relating to the conduct of the election affected the result of the same. The onus which s 32(b) places on a petitioner is to prove to the satisfaction of the Election Judge the several matters stated there, and not to plead how the non-compliance with written law relating to the conduct of the election has affected the result of the same, as contended by learned Senior Federal Counsel. In this regard I agree with counsel for the petitioner that s 32(b) is an empowering provision and not a procedural section.

[37] Learned Senior Federal Counsel referred me to several cases in support of his submissions on this objection but a proper reading of them shows that none of them say that the petitioner must state how the non-compliance has affected the result of the election.

[38] The sixth objection was that the petitioner contravened s 9A of the Act, in that in the second part of para 7 of the petition the petitioner alleged that voters were unable to cast their votes on polling day because their names could not be found in the electoral rolls or were unlawfully removed from the electoral rolls whereas they had previously voted at the constituency.

[39] Section 9A of the Act provides that once an electoral roll has been certified or recertified and notice of such fact has been published in the gazette, it 'shall be deemed to be final and binding and shall not be questioned or appealed against, or reviewed, quashed or set aside by, any court'.

[40] The second respondent complains that by the allegations in the second part of para 7, the petitioner is in effect calling into question the electoral roll. Although the petitioner denies that he is doing so I agree with Learned Senior Federal Counsel that he is clearly questioning the contents and validity of the electoral rolls when he alleges that voters could not vote because their names could not be found on the electoral rolls or were unlawfully removed from the electoral rolls.

[41] However, I do not agree with the learned Senior Federal Counsel that this transgression in pleading by the petitioner would result in the whole petition being struck out. In my view, at worst, only the offending allegation in the second part of para 7 ought to be struck out. I say this because each paragraph of the petition is capable of standing on its own so that if a particular paragraph is defective and ought to be struck out, the unaffected paragraphs remain intact.

[42] The seventh ground of objection was that the petitioner failed to comply with r 9 of the Rules, in that, it was alleged that 'the writing left at the office of the registrar on 24 June 2004 was:

(i) not left together with the petition on 30 April 2004;

(ii) not signed by the petitioner himself;

(iii) not duly stamped with the duty payable thereon.'

[43] I regret I find no merit in this objection and have no hesitation rejecting it. The 'writing' which the second respondent has seen fit to complain about here is actually the notice filed at the registry by the advocate for the petitioner, giving notice that he has been appointed to act. The notice is filed pursuant to r 34 of the Rules which reads:

> An advocate shall, immediately upon his appointment as such, leave written notice thereof at the office of the Registrar.

[44] There is nothing stated in this rule that requires: **A**

(i) the notice to be left together with the petition as alleged by the second respondent;

(ii) the notice to be signed by the petitioner himself as alleged by the second respondent; **B**

(iii) the notice to be duly stamped with the duty, payable thereon as alleged by the second respondent.

[45] But the second respondent contends that r 34 is only applicable to an advocate appointed by the respondent because any advocate appointed by the petitioner must be done under r 9 and so any notice of such appointment must comply with the matters mentioned in (i) (ii) and (iii) above. **C**

[46] I cannot agree with this contention. In my judgment r 34 applies to advocates appointed by both the petitioner and the respondent and is not confined in its application to the advocate appointed by the respondent only, and, there is nothing in r 9 to suggest, which the second respondent has, that having given notice that he will act personally, the petitioner is subsequently prohibited from appointing an advocate to act for him, or, having authorized an advocate to act for him, the petitioner is not free to appoint another advocate in his place. The second respondent has said it is not possible for the petitioner to do what I have just said because according to the second respondent, once the petitioner has made a nomination regarding an advocate under r 9, he must stick with it forever because the writing must be left at the registry with the petition and filing in writing at any other time after that would be too late and constitute a breach of that rule. I cannot agree with the second respondent's contention. To expose its infirmity I pose this question: Say the petitioner appoints an advocate who unfortunately dies; if what the second respondent contends is correct then the petitioner will not be able to act for himself nor will he be able to appoint another advocate. Surely the law must not be interpreted to produce absurd results. **D** **E** **F** **G**

[47] I now return to deal with the third objection raised which was that the petitioner had failed to comply with r 3(2) of the Rules which requires that when the petitioner presents his petition at the office of the registrar 'there shall also be left with the petition two copies thereof'.

[48] This objection is taken by both the first and second respondent as a result of a search conducted on the court file on their behalf after they were served. A search was conducted on behalf of the first respondent on 27 May 2004 and on behalf of the second respondent on 19 May 2004. **H**

[49] As a result of the search conducted on behalf of the first respondent it was allegedly discovered that only two copies of the petition were left in the court file and a notice of presentation of petition had been posted up on the **I**

notice board of the High Court on 17 May 2004 by a court clerk, Mr Tanjil Taimin. At the date of search, the petitioner had not yet filed an affidavit of service, which was only filed after the first respondent's motion was filed on 28 May 2004.

[50] The petitioner filed several affidavits to oppose the first respondent's motion, from his affidavits the following facts emerge:

(i) On 30 April 2004 the petitioner filed at the registry the following documents:

(a) 10 copies of election petition;

(b) eight copies of notice of presentation;

(c) four copies of receipt of election petition.

(ii) On 12 May 2004 the petitioner personally went to the registry and the following documents were returned to him:

(a) eight copies of election petition;

(b) seven copies of notice of presentation of petition.

(iii) On 13 May 2004 the petitioner returned to the High Court registry under cover of his letter dated 12 May 2004 the following documents for the purpose stated in his letter:

(a) two copies of election petition;

(b) two copies of notice of presentation of petition; and

(c) two copies of notice of address of service.

[51] In view of its importance, the contents of the petitioner's covering letter of 12 May 2004 is reproduced here, it reads:

Tarikh : 12hb Mei 2004

Timbalan Pendaftar Mahkamah Tinggi Kota Kinabalu

Tuan,
Election Petition No. KP26-01 of 2004

……..……
……..

Sebagai penyampaian, seperti yang diperuntukkan dalam Undang-Undang Kecil Petisyen Pilihanraya 1954 Undang-Undang 15(1)(c), bersama ini saya kemukakan dokumen-dokumen berikut untuk dipaparkan di Papan Kenyataan di Mahkamah Tinggi Kota Kinabalu:

(1) 2 salinan Election Petition No. EP K26-01 of 2004;
(2) 2 salinan Notice of Presentation of Petition; dan
(3) 2 salinan Notice of Address of Service

Sila akui penerimaan.Yang benar,
Sgd: (Ruhimin Adzim @ Ruhimin bin Ajun).

[52] Based on the above facts the petitioner submitted that he is not to be blamed for the number of copies of the petition that were returned to him by the court registry and for the number of copies of the petition kept in the court file. The petitioner further contends that he is not in breach of r 3(2) as he has substantially complied with the same when he returned two copies of the petition to the court registry on 13 May 2004 which, according to counsel, the petitioner 'intended the same to be made available for service under r 15(1)(c)'.

[53] From the facts disclosed and the submissions of counsel, two questions have arisen for determination on this objection; they are:

(1) Did the petitioner comply with rule 3(2) of the Rules?

(2) If he did not, what is the consequence of such non-compliance? I will now address each of these questions.

Was rule 3(2) complied with?

[54] In view of the petitioner's admission that eight copies of the petition were returned to him by the court registry on 12 May 2004, I do not think it can be disputed by him that as at that date, r 3(2) had not been complied with as only two copies of the petition were left at the court registry, whereas r 3(2) requires the petition *and* two copies to be left in the registry. The next question that must be asked is whether the petitioner had complied with r 3(2) by 13 May 2004 when he returned two copies of the petition to the registry. The suggestion here by the petitioner is that by returning two copies of the petition to the registry on 13 May 2004, he had 'left' four copies of the petition at the registry and in so doing he had either complied with or substantially complied with r 3(2). In my judgment the petitioner cannot be said to have done either for the following reasons. Rule 3(2) is clear and unambiguous in its language.

The rule requires that there shall '... be left …' two copies thereof, can it be said that when the petitioner returned two copies of the petition to the registry on 13 May 2004, he was 'leaving' them at the registry? I do not think he was, because the purpose for which the two copies of the petition were being returned to the Registry is clearly stated in the petitioner's letter of 12 May 2004, which I set out earlier, They were clearly not returned to the Registry for the purpose of 'being left' with the petition, but for the express purpose of service on the respondents by way of posting up on the notice board of the High Court in accordance with r 15(1)(c) of the Rules. In support of what I say, I refer *Dr Lee Chong Meng v Abdul Rahman bin Hj Abdullah, Returning Officer & Ors (No 2)* [2000] 3 MLJ 218 at p 299, where Augustine Paul J (as he then was) sitting as an Election Judge said this about r 3(2):

> To argue that the copy of the petition posted on the High Court notice board on 17 February 2000 amounts to it being left with the petition is to torture the meaning of r 3(2). What r 3(2) requires is for the two copies to be left with the petition. This means that they must be left with the petition at the time it is presented, that is to say, on 10 February 2000. The copy posted on the notice board does not comply with the requirement of r 3(2) for two reasons: Firstly, it was taken out from the registry and posted on the notice board on 17 February 2000. It was therefore not left with the petition as required. Secondly, posting it on the notice board does not amount to it being left with the petition as contemplated by r 3(2). I am therefore of the view that there has been non-compliance with r 3(2).

[55] I respectfully agree with what was said there. Reverting to the facts of our case, the two copies returned to the registry were actually taken out of the registry before they were returned and therefore cannot be said to have 'also been left with' the petition as required, and, as I mentioned earlier they were not returned for the purpose of being left with the petition as contemplated by r 3(2); they were returned to be posted up on the notice board of the High Court by way of service on the respondents and in actual fact anyone passing the notice board of the High Court will notice that one copy of the petition was posted up on 17 May 2004. In my view, the fact that the registry had not actually posted up both the petitions on the notice board does not alter in any way the fact that the two petitions were not returned for them to be left with the petition as required by the rule.

[56] For the reasons given above I find that the petitioner's return of the two copies to the registry for posting up on the notice board by way of service, did not afford substantial compliance with r 3(2). It will be noted that I have said that the two copies of the petition were returned for service by posting on the notice board, and not that the petitioner had 'intended the same to be made available for service under r 15(1)(c)' as suggested by counsel for the petitioner in his submissions. I have said so because this is what the petitioner's letter of 12 May 2004 states while what his counsel has said in submissions is obviously a slant put onto the fact that the two copies were returned to the registry in an attempt to show that they were 'being left' with

the petition, which I reject. It follows from what I have said that I find the petitioner has not complied with r 3(2).

What is the consequence of such breach of r 3(2)?

[57] Counsel for the petitioner submitted that he should not be blamed for the breach as eight copies of the petition were returned to him by the registry. I regret, I cannot agree with this submission. The language in s 3(2) clearly imposes a duty on the petitioner to leave the two copies with the petition at the registry, and not on the registry to retain the correct number of copies. This same issue was also raised in *Ramely bin Mansor v Suruhanjaya Pilihanraya Malaysia & Ors* [2000] of MLJ 550 at p 557. This is what Augustine Paul J said about the statutory obligation imposed on a petitioner by r 3(2):

> The language of r 3(2) imposes a statutory obligation on the petitioner to leave two copies of the petition with the Court. Rule 3(2) does not say, as correctly submitted by learned counsel for the third respondent, that the court shall retain two copies of the petition in which event it will be the responsibility of the court to do so when more than two copies are filed. The words '… shall also be left....' in r 3(2) show that it is the obligation of the petitioner to leave two copies with the court.

[58] I respectfully agree with what was said there by the learned judge.

[59] Since it is the petitioner's responsibility to ensure compliance with r 3(2) which he has not done, what remains to be decided is the consequence of such non-compliance with r 3(2) by the petitioner. It was submitted on his behalf that r 3(2) should only be regarded as a mandatory provision if the petitioner had chosen to effect service by the mode allowed by r 15(1)(c), but since service on the first respondent had been effected by post as allowed by r 15(1)(b), and on the second respondent by personal service as allowed by r 15(1)(a), the breach was not fatal to the petitioner. I regret I cannot agree with this submission for the following reasons.

[60] In the first place, the right which the petitioner is seeking to exercise by filing this petition i.e. to have the election of the first respondent declared void, is not a right known to the common law or equity; it is a right derived purely from a specific statute relating to elections and it is well-established that the statutory requirements of election laws are mandatory and must be strictly observed. Thus, in *Tengku Korish v Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6 at p 6 & 7, Raja Azlan Shah J (as His Highness then was) had this to say on the matter:

> It is well recognised that I must not go outside the province of the election law, The Election Offences Act 1954 confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of. Wills J stated this rule with great clarity in *Wolverhampton New Waterworks Co v Hawkesford* 6 CB (NS) 336; 141 ER 486 at p 495 in the following passage:

> There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law. There, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that of the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy. There, the party can only proceed by action at common law. But there is a third class, viz, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it… The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The present cases fall within the latter class.

The Rules cited in this passage was approved by the House of Lords in *Neville v London Express Newspaper Ltd* (1919) AC 368 and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v Gordon Grant & Company* [1935] AC 532.

What 'right' does the Election Offences Act 1954 confer, using the word 'right' in its broad sense? In my judgment, the right conferred by that Act is a special kind of right unknown to the common law or, equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v Laudry* (1876) 2 App Cas 102, *Goonesinha v Hon C I de Kretser* (1945) AC 63 or what is said *in Arzu v Arthur* [1965] WLR 675 as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v Returning Officer, Nammakkal Constituency & Ors* [1952] SCR 218).

The statutory requirements of election laws are mandatory and must be strictly observed: see *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261, *Harcharan Singh v Mohinder Singh* AIR 1968 SC 1500 and *Chong Thain Vun v Watson & Anor* [1968] 1 MLJ 65.

[61] Likewise, in *Dr Lee-Chong Meng v Abdul Rahim bin Hj Abdullah* (No 2), Augustine Paul J had this to say on the matter:

> It has been accepted that strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it (see *NP Ponnuswami v Returning Officer, Nammakkal* AIR 1952 SC 64). In this regard I refer to *Stevens v Tillett* (1870) LR 6 CP 147 where Bovill CJ said at p 155:
>
> The jurisdiction of this court with regards to the trial of election petitions, depends entirely upon the Parliamentary Elections Act 1868; and the decisions of the election judges must be governed by the provision of that statute.

As Goswani J said in *Satya Narain v Dhuja Ram & Ors* AIR 1974 SC 1185 at p 1190 the right to challenge an election:

> ... is a special right conferred under a self-contained special law and the court will have to seek answer to the question raised within the four corners of the Act and the powers of the court are circumscribed by its provisions. It is not a common law right and an election petition cannot be equated with a plaint in a civil suit.

Therefore the statutory requirements of an election petition must be strictly observed because an election dispute is a statutory proceeding unknown to the common law or equity (see *Harcharan Singh v Mohinder Singh* ARI 1968 SC 1500).

[62] Augustine Paul J went on to say at p 231 of the same case:

> Thus it is well-established that the right of a person to file an election petition is derived from a specific statute relating to election and that any proceeding laid down by such special statute shall be strictly adhered to as it is mandatory (see also *Hugh Siak Meng & Anor v Daing Ibrahim* [1975] 4 MC 275).

[63] And later in the same judgment his Lordship said the requirement to leave 2 copies of the petition as provided in r 3(2) is a mandatory provision the breach of which will result in dismissal of the petition. This is what his Lordship said about the requirements of r 3(2):

> The requirement to leave copies of the petition as provided is mandatory and non-compliance with the rule will result in dismissal of the petition (see *Re Burrand Dominon Election* (1901) 22 CLT 10; *Safya Narain v Dhuja Ram & Ors* AIR 1974 SC 1185).

[64] In the second place, for my part, the question whether the provisions of r 3(2) are mandatory or merely directory in nature is to be decided in accordance with that rule of statutory interpretation spoken of by Lord Panzance in *Howard v Bodington* (1877) 10 2PD 203 at p 211 where he said:

> I believe, as far as any rule is concerned, you cannot go further than that in each case you must look at the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory …

[65] Now, looking at the Election Petition Rules as a whole, it is my view that the requirement to leave 2 copies with the petition at the registry is connected with the all important issue of proper service of a petition which, so lucidly pointed out by Augustine Paul J in *Dr Lee Chong Meng's case (No 2)*, is a condition precedent to the jurisdiction of the court hearing on election petition. In this regard r 15 provides for 3 modes of service, one of which is by posting a notice on the notice board of the High Court and by publishing a notice in a national language newspaper and another newspaper circulating in the constituency in which the election was held, stating that an election petition has been presented against the respondent and that a copy of the

notice of presentation of the petition 'and a copy of the petition may be obtained by the respondent free of charge on application at the office of the registrar' as provided in r 15(1)(c). So it is to give effect to and facilitate r 15(1)(c) that a petitioner is required by r 3(2) to also leave with the petition 2 copies thereof at the registry so that in the event the petitioner resorts to r 15(1)(c) to serve the petition, the respondent may avail himself of the right to obtain a copy of the petition, free of charge, on application at the registry.

[66] That being the object behind r 3(2), the provision must be strictly interpreted because its whole purpose would be defeated should a petitioner resorts to service under r 15(1)(c) but does not leave the required copies of the petition at the registry for then the respondent would be placed in the invidious position of having been notified in the newspapers but not being able to obtain a copy of the petition on request and of not being able to know what charges or allegations are made against him or on what grounds his election is sought to be avoided, and how be should respond to the petition.

[67] I should also point out that a good indication of the mandatory nature of r 3(2) is that it is couched in peremptory language with the use of the word 'shall'. For the above reason I find that the provisions of r 3(2) are mandatory.

[68] It is the submission of the petitioner that r 3(2) should only be regarded as a mandatory provision if the petitioner had chosen to effect service by the mode allowed by r 15(1)(c). I regret I cannot agree with this submission for the following means. What the petitioner is in effect saying is that the way in which the petitioner exercises the discretion given to him by r 15 regarding the mode of service of the petition decides whether an important provision of electoral law is mandatory or directory only. In my judgment this cannot be correct as firstly, such an interpretation runs contrary to the express words in r 3(2) which requires that the 2 copies must be left with the petition. This means that they must be left with the petition at the time it is presented and not at some later date when the petitioner has decided how he will serve the petition. Secondly, the registry cannot or rather is not expected to anticipate which mode of service the petitioner will choose and therefore made to wait before the petitioner complies with r 3(2), when the rule expressly requires that the 2 copies of the petition be left at the time it is presented.

[69] Another reason for not agreeing with the submission of the petitioner that r 3(2) should only be regarded as mandatory if the petitioner chooses to effect service in accordance with r 15(1)(c) is that it is not open to the petitioner to take such an argument as he cannot be allowed to reprobate what he has approbated. I say this because I am firmly of the view that on 13 May 2004, when the petitioner forwarded the two copies of the petition to the registry for service by posting up on the notice board of the High Court, he was in effect trying to effect service by the mode authorised by r 15(1)(c). In fact his covering letter of 12 May 2004 states so. To my mind the fact that the

petitioner did not, for reasons best known to himself, take the further step of publishing in the newspapers a notice of the presentation of the petition, or that he may have misinterpreted and misunderstood how service under r 15(1)(c) is effected, cannot alter the fact that he did try to serve the petition by the mode allowed by r 15(1)(c). In the circumstances he cannot reside from that position. For the avoidance of doubt, I am not saying that the petitioner cannot adopt more than one mode of service. What I am saying is that once he has done so, he cannot be heard to deny having done so, which is what the petitioner is now trying to do through his argument. It should also be noted that the petitioner has not offered any explanation why he did not go through with service according to r 15(1)(c). Whatever explanation there is appears in the submissions of counsel which is inadmissible.

[70] Now, it was submitted by counsel for the petitioner that in deciding this objection I should, pursuant to O 1A Rules of the High Court, have regard to the justice of this case and not only to the technical non-compliance of r 3(2). In response, I should point out two things: Firstly, O 1A commences with the words 'in administering any of the Rules herein' and concludes with '… and not only to the technical non-compliance of any of the Rules herein.' But I am not here administering any of the Rules of the High Court. Secondly, for the reasons already explained earlier any non-compliance with r 3(2) cannot be regarded as a mere technicality.

[71] The consequence of the petitioner's failure to comply with the mandatory requirements of r 3(2), when presenting his petition is that it renders the petition defective by reason whereof it must be dismissed.

[72] I will now deal with the last two objections which are those taken by the first respondent only.

[73] The first respondent complained that when his advocate conducted a search of the court file on 27 May 2004, it was noticed that the petitioner had not filed an affidavit of service as required by r 15(4) of the Rules. So it is alleged that a breach of that rule has been occasioned.

[74] I regret I see nothing in the point taken. Rule 15(4) does not stipulate any time frame within which an affidavit of service must be filed and the petitioner did file an affidavit of service on 3 June 2004. Section 54(2) of the Interpretation Act 1948 and 1967 states that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed. I do not think the petitioner has unduly delayed in filing his affidavit of service and so I reject this objection.

[75] The remaining objection of the first respondent is that he was not served within the petition within 15 days of the presentation of the same as required by r 15(1) of the Rules.

[76] For the purposes of deciding this objection the following facts are not in dispute.

(i) The date of publication of the result of the election was gazetted on 12 April 2004. Since s 38(1) of the Act requires that every election petition shall be presented 'within 21 days of the date of publication of the result of the election in the gazette,' the last day to present the petition in this case fell on 3 May 2004;

(ii) The petition was presented at the High Court registry on 30 April 2004 a Friday;

(iii) On 12 May 2004 the petitioner received back from the registry eight copies of the petition;

(iv) On 13 May 2004 the petitioner took steps to serve on the first respondent with the notice of presentation of petition and a copy of the petition by pre paid registered post in accordance with r 15(1)(b), by delivering to the postal authorities an envelope addressed to the first respondent at his place of work at Putrajaya, Peninsula Malaysia;

(v) The first respondent received the notice and the petition at Putrajaya on 17 May 2004;

(vi) The first, second, third and fourth of May 2004 were public holidays, 1 May 2004 being Labour day, 2 May 2004 being the Birthday of Prophet Muhammed, 3 May 2004 being Wesak Day and 4 May 2004 being a replacement for the public holiday which fell on Sunday.

[77] It is the contention of the first respondent that when he received the petition on 17 May 2004 the 15 days allowed for service had already expired. The first respondent relies on the following computation of time for his submission. As the election results were gazetted on 12 April 2004, the petitioner had 21 days within which to present his petition, the last day of which fell on 3 May 2004, but since 3 May 2004 was a public holiday and 4 May 2004 was a replacement day for the public holiday that fell on Sunday, the last day to present the petition was 5 May 2004. If the petitioner had presented his petition on 5 May 2004 then the 15 days for service would run from that day. However, the petitioner presented his petition on 30 April 2004 which was not a public holiday or excluded day and so the 15 days began to run from 1 May 2004 and expired on 15 May 2004. So it is the first respondent's case that when he received the petition on 17 May 2004, service had been effected out of time as the 15 days allowed for service had already expired.

[78] I should point out that in his submission, counsel for the first respondent took the stand that since r 15 is silent as to the number of days after posting when service will be deemed to have been effected on a respondent to a petition, service 'shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post in accordance with s 12(b) of the Interpretation Act 1948 and 1967.

[79] In this regard it is the contention of the first respondent that a registered letter posted from Kota Kinabalu, Sabah to Putrajaya, Peninsular Malaysia would be delivered in the ordinary course of post within four working days after posting.

[80] Hence, counsel for the first respondent submitted that in this case a rebuttable presumption that service of the petition was effected on 19 May 2004 had arisen because if posting was effected on 13 May 2004 the registered letter containing the petition would be delivered in the ordinary course of post on 19 May 2004 as there was no postal delivery on 15 May 2004 it being a third Saturday and the 16 May 2004 being a Sunday.

[81] In support of his contention that a registered letter posted from Kota Kinabalu Sabah to Putrajaya would be delivered in the ordinary course of the post within 4 working days after posting, the first respondent produced a letter from one Encik Ahsim Jamat, Head of Mail Operation, Pos Malaysia Berhad in which he said that Pos Malaysia had set a service standard which is the time taken between posting and delivery of mail, to measure the performance of delivery internally only. The service standard for registered post adopted by Pos Malaysia was as follows:

CATEGORY 1		
1)	Within the same state a) Local Delivery b) Between Towns c) Between Outskirt Towns	 D + 2 D + 3 D + 4
CATEGORY 2		
2)	Between States a) Between Major Towns b) Between Other Towns c) Between Outskirt Towns	 D + 3 D + 4 D + 5
CATEGORY 3		
I) II)	Between Peninsular, Sabah & Sarawak Between Sabah (Kota Kinabalu) / Sarawak (Kuching) and Peninsular (Major Towns) Between Sabah (other Towns) / Sarawak (other Towns) and Peninsular (other Towns)	D + 4 D + 5

III)	Between Sabah (Outskirt Towns) / Sarawak (Outskirt Towns) and Peninsular (Outskirt Towns)	D + 6

[82] The measurement manner of the service standard mentioned above is as follows:

D meaning the day the posting is made

D+1 meaning delivery 1 day after the posting is made

D+2 meaning delivery 2 days after the posting is made

D+3 meaning delivery 3 days after the posting is made

D+4 meaning delivery 4 days after the posting is made and so on.

[83] Nevertheless, this service standard is measured on working days only and does not include gazetted Public Holidays.

[84] Based on the evidence produced by the first respondent I accept that a registered letter posted from Kota Kinabalu Sabah to Putrajaya will be received 4 working days after posting in the ordinary course of post. However, counsel for the first respondent is willing to concede, that as the first respondent actually received the petition through the post on 17 May 2004, that was the date service was effected on him because in his view the evidence of the date of actual receipt by the first respondent of the petition was sufficient to rebut the presumption in s 12(b) of the Interpretation Act. But counsel for the first respondent pointed out that this would still not help the petitioner because the last day for service fell on 15 May 2004.

[85] The petitioner, on the other hand, denies that service had been effected out of time. It is his case that the 15 days' period only began to run from 5 May 2004 as 1-4 May 2004 were public holidays. So the 5 May 2004 being the next working day, 15 days expired on 19 May, 2004. Since the first respondent was served on 17 May 2004, the petitioner says he was served well within time. In support of his computation of time the petitioner relies on s 54(a) and (c) of the Interpretation Act 1948 and 1967. Section 54 reads:

Computation of time

(1) In computing time for the purpose of any written law —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this sub-section as excluded days) the period shall include the next following day which is not an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

(d) where any act or proceeding is directed or allowed to be done or taken within any not exceeding six days, excluded days shall not be reckoned in the computation of the time.

[86] As an alternative stand, the petitioner submitted that service of the petition on the first respondent was effected on the day of posting itself i.e. on 13 May 2004 when the letter properly addressed to the first respondent at his office at Putrajaya and containing the notice of presentation of the petition and a copy of the petition was delivered to and accepted for posting at the post office, Kota Kinabalu.

[87] Nothing further needs to be said about this contention of the petitioner because at the hearing his counsel abandoned this ground, and correctly so in my view.

[88] A further alternative stand was taken by the petitioner on service. It was his case that the 15 days' period for service did not begin to run until 12 May 2004 because that was the date the petition was returned to him for service and, therefore, he cannot be expected to comply with r 15(1) prior to 12 May 2004. In support of this contention the petitioner relies on the latin maxim *lex non logit ad impossibilia* or 'the law does not require a man to do that which he cannot possibly perform'.

[89] Since both the petitioner and the first respondent agree that service of the petition was effected on the first respondent in the ordinary course of the post on 17 May 2004, the decision on this issue will turn on whether the petitioner is correct in his contention that the 15 days' period only began to run on 5 May 2004 and not 1 May 2004 as contended by the first respondent.

[90] I have no difficulty accepting the petitioner's contention that because he presented his petition on 30 April 2004, this day itself is to be excluded in computing the 15 days' period as r 15 requires him to serve the petition 'within 15 days of the presentation of the petition,' and s 54(1)(a) of the Interpretation Act says that in computing time, the period of days from the happening of an event or the doing of an act or thing shall be exclusive of the day on which the event happens or the act or thing is done.

[91] The next question is whether the 15 days' period began on the next day i.e 1 May 2004 which was a public holiday? If it did not, then it would also not have started to run on the following three days ie 2 May 2004, 3 May 2004 and 4 May 2004 because they too were public holidays. In deciding this question s 54(1)(b) of the Interpretation Act is of no assistance to the petitioner because this sub section caters for a situation where the last day of the period

for the happening of any event or doing any act or thing is a weekly holiday or public holiday (excluded days), in which event the happening of the event or doing of the act or thing can take place or be done on the next following day which is not an excluded day. Here the last day to the 15 days' period to serve the petition did not fall on 1 May 2004 and so s 54(1)(b) is not applicable.

[92] From his submission counsel for the petitioner has relied heavily on s 54(1)(c) of the Interpretation Act to support his contention. Counsel submitted that s 54(1)(c) caters for a situation where any act or proceeding is directed or allowed to be done or taken on a certain day, but that certain day happens to be an excluded day. If the act or proceeding is done or taken on the next following day which is not an excluded day, then the act shall be considered done in due time. Counsel for the petitioner then submitted and I quote:

> Hence, it is humbly submitted that when *service* of the petition *is directed* under r 15(1) *to be done on first May,* which is an excluded day, it shall be considered as done on the 5th May the next following day which is not an excluded day (emphasis addded).

[93] It is clear to me from the highlighted parts of what counsel said that his submission is fundamentally flawed because there is no direction in r 15(1) that the petition is to be served on 1 May 2004 as alleged by the petitioner. What r 15(1) requires is that the petitioner performs an act, namely, that the petition be served on the first respondent within 15 days of its presentation. And in fact there was no need for the petitioner to have presented the petition on 30 April 2004 as he did because he had until 3 May 2004 which was the last day of the 21 days' period within which the petition had to be presented from the date of publication of the results of the election in the gazette, which took place on 12 April 2004. So the petitioner's contention that he was required to serve the petition on 1 May 2004 is totally misconceived. This again demonstrates that the petitioner's reliance on s 54(1)(c) of the Interpretation Act to compute that the running of the 15 days' period under r 15(1) had not begun to run until 5 May 2004 is misplaced.

[94] Accordingly there is no basis in law to hold in this case that in computing the 15 days' period to serve the petition the first, second, third and fourth of May 2004 are to be excluded. Since the petition was presented on 30 April 2004 and the 15 days within which to serve it expired on 15 May 2004, but the first respondent was only served on 17 May 2004. I agree with counsel for the first respondent that the petition was served out of time.

[95] I am aware that the 15 May 2004 was a third Saturday which is a non-working day for the government and its agencies, but I agree with counsel for the first respondent that it is not an excluded day. Section 3 of the Interpretation Act 1948 and 1967 defines 'public holiday' as a public holiday established by law in Malaysia or any part of Malaysia and 'weekly holiday' as Sunday or, in a state where Friday is observed as a weekly holiday, Friday. Hence, a third Saturday is not a weekly or public holiday and so not an excluded day.

[96] Even if it can be argued that the first, second, third and fourth of May 2004 are to be excluded when computing the fifteen days' period because they are public holidays, I agree with counsel for the first respondent that on the facts this case, s 54(1)(d) of the Interpretation Act would apply to include them in the reckoning period, since the act of service was directed to be done within a period in excess of six days. (See *Re Dato' Loh Fook Yen Ex Parte Malaysian United Finance Bhd* [1988] 3 MLJ 499).

[97] With regard to the petitioner's alternative argument that the 15 days' period did not begin to run until 12 May 2004 because that was the date the petition was returned to the petitioner for purposes of service, I regret that I cannot agree with this submission for the simple reason that to do so would be tantamount to reading into the Rules words that are not there and in contradiction to the express words in the rule.

[98] With regard to the legal maxim that 'the law does not require a man to do that which he cannot possibly perform', while I sympathize with the petitioner for his predicament, it is my view that the maxim has no application here as the petitioner could have arranged his affairs to avoid the pitfalls he now faces because the law gave him 21 days within which to present his petition.

[99] What I have just said about not being prepared to read into the Rules words which are not there would also apply to the submission of the petitioner that the 15 days' period only began to run from 3 May 2004, which according to counsel for the petitioner, was the date when the petition was deemed to be at issue. The time within which a petition is to be served is expressly provided for in r 15(1) and it is to that rule that the court should look, not r 16 as now suggested by counsel for the petitioner.

[100] The consequence of the petitioner's failure to serve the petition in accordance with the mandatory provisions of r 15(1) regarding service is that a condition precedent to the court exercising jurisdiction in this case has not been fulfilled, thereby rendering the petition a nullity which the court in the exercise of its inherent powers will dismiss with costs to the first and second respondents which I now do. (See *Deven Nair v Yong Kuan Teik* [1967] 1 MLJ 261; *Dr. Lee Chong Heng v Abdul Rahman bin Hj Abdullah & Ors*; *Chong Thian Vun v Watson & Anor* [1968] 1 MLJ 65.

[101] The second respondent has applied for costs of two counsels but I see no good reason to exercise such discretion as this has only been a hearing of preliminary objections and the matters raised are not of a very complicated nature.

Petition dismissed with costs

Reported by AG Kalidas